

**UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA**

KEVIN EIKLEBERRY,
Plaintiff,

vs.

WASHOE COUNTY,
Defendants.

3:12-cv-00607-RCJ-WGC

ORDER

This is a federal wage dispute arising out of unpaid on-call time. Pending before the Court is a motion to reconsider (ECF No. 9) its order granting Defendant's motion to dismiss (ECF No. 8). For the reasons given herein, the Court denies the motion.

I. FACTS AND PROCEDURAL HISTORY

From September 27, 2010 to August 18, 2011, Plaintiff Kevin Eikleberry was a Sergeant for the Washoe County Sheriff's Office ("WCSO"), serving as a supervising sergeant for WCSO's Search and Rescue Team. (Compl. ¶¶ 6–7, Nov. 15, 2012, ECF No. 1). These duties required Plaintiff to remain on-call, usually on weekends. However, Defendant did not pay Plaintiff for time spent on-call, which totaled 5655 hours, equating to \$53,722.50 in pay. (*Id.* ¶¶ 7–8). Plaintiff sued Defendant in this Court for unpaid wages pursuant to § 16(b) of the Fair Labor Standards Act ("FLSA"), 29 U.S.C. § 216(b). Defendant moved to dismiss under Rule 12(b)(3) for improper venue. Because Defendant's arguments were based on Plaintiff's failure to allege exhaustion of administrative remedies, the Court treated the motion as a "non-enumerated" Rule 12(b) motion." (Order, ECF No. 8, at 2 (quoting *Inlandboatmens Union of*

1 *Pac. v. Dutra Grp.*, 279 F.3d 1075, 1078 & n.2 (9th Cir. 2002))). The Court granted the motion
 2 and ordered the case closed, finding that Plaintiff had failed to allege that he grieved and
 3 arbitrated the dispute, which is plainly required under the controlling Collective Bargaining
 4 Agreement (the “CBA”), and that Plaintiff filed his opposition to the motion almost two full
 5 months after the stipulated extended deadline, in violation of Local Rule 7-2(d). (*See* Order, ECF
 6 No. 8, at 3). Plaintiff now moves the Court to reconsider.

8 **II. LEGAL STANDARDS**

9 A motion to reconsider must set forth “some valid reason why the court should reconsider
 10 its prior decision” and set “forth facts or law of a strongly convincing nature to persuade the
 11 court to reverse its prior decision.” *Frasure v. United States*, 256 F.Supp.2d 1180, 1183 (D. Nev.
 12 2003). Reconsideration is appropriate if the Court “(1) is presented with newly discovered
 13 evidence, (2) committed clear error or the initial decision was manifestly unjust, or (3) if there is
 14 an intervening change in controlling law.” *Sch. Dist. No. 1J v. Acands, Inc.*, 5 F.3d 1255, 1263
 15 (9th Cir. 1993). “A motion for reconsideration is not an avenue to re-litigate the same issues and
 16 arguments upon which the court already has ruled.” *Brown v. Kinross Gold, U.S.A.*, 378
 17 F.Supp.2d 1280, 1288 (D. Nev. 2005).
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20 **III. ANALYSIS**

21 Plaintiff does not expressly state a basis for reconsideration. However, the motion
 22 essentially asserts that the Court committed clear error, with respect to multiple findings, when it
 23 granted Defendant’s motion to dismiss. (*See generally* Mot. to Recons., ECF No. 9). The Court
 24 Disagrees.
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26 As an initial matter, under Local Rule 7-2(d) Plaintiff’s failure to file a response to the
 27 motion to dismiss prior to the stipulated extended deadline “constitute[d] a consent to the
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1 granting of the motion [to dismiss].” Thus, the Court could deny the instant motion based solely
 2 on Plaintiff’s failure to timely respond. However, because of “the strong policy underlying the
 3 Federal Rules of Civil Procedure favoring decisions on the merits,” *Eitel v. McCool*, 782 F.2d
 4 1470, 1472 (9th Cir. 1986), the Court will address each of Plaintiff’s arguments, and, ultimately,
 5 reach the same conclusion.

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 7 Plaintiff makes three arguments for reconsideration: (1) that he sufficiently plead
 8 exhaustion of his administrative remedies; (2) that by referring to documents not submitted in the
 9 complaint, but submitted with the motion to dismiss, the Court effectively granted summary
 10 judgment, but did so without applying the standard for summary judgment; and (3) that the Court
 11 disregarded controlling authorities that provide that persons covered by a CBA need not exhaust
 12 administrative remedies when filing a claim under the FLSA.
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14 **A. Failure to State a Claim**

15 Where an agreement contains an arbitration provision, a court must require the parties to
 16 submit disputed claims to arbitration absent an indication that the parties intended to exclude the
 17 subject matter of the claims from the scope of the arbitration provision. *AT&T Technologies, Inc.*
 18 *v. Commc’ns Workers of Am.*, 475 U.S. 643, 654 (1986). Non-exhaustion of such procedures is a
 19 jurisdictional matter properly addressed via a motion to dismiss. *Inlandboatmens Union of Pac.*
 20 *v. Dutra Grp.*, 279 F.3d 1075, 1083 (9th Cir. 2002).
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22 Article 14 of the CBA, to which both parties are subject, governs disputes concerning on-
 23 call time, (CBA, ECF No. 5-1, at 10–11), and Article 33 establishes mandatory internal
 24 procedures for resolving such disputes, (*Id.* at 22–23). These procedures require complaining
 25 employees to first submit a written grievance, specifying the provision of the CBA that has been
 26 violated and stating the facts constituting the alleged violation. (*Id.*). If the grievant is not
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1 satisfied with the decision on the grievance, he must then submit the matter for arbitration (*Id.*).

2 There is no indication that the Parties intended to exclude claims for on-call or standby
3 compensation from the scope of the arbitration provisions. (*See generally id.*).

4 Plaintiff's complaint alleges nothing with respect to filing a grievance, submitting to
5 arbitration, or otherwise exhausting the procedures mandated by the CBA. (*See generally*
6 *Compl.*, ECF No. 1). Instead, and as Plaintiff acknowledges, the complaint alleges only that
7 Plaintiff "demanded compensation for such work at the appropriate rate," and that "defendant
8 has refused to pay said compensation." (Mot. to Recons., ECF No. 9, at 4 (quoting *Compl.* ¶9,
9 ECF No. 1)). Plaintiff attempts to cure this deficiency, arguing that "[a]lthough not stated in the
10 [c]omplaint that the demand was made by filing a grievance and an amended grievance, that is
11 precisely what occurred." (*Id.*). A deficient pleading, however, cannot be cured by new
12 allegations raised in a plaintiff's opposition to a motion to dismiss. *Schneider v. Cal. Dep't of*
13 *Corr.*, 151 F.3d 1194, 1197 n. 1 (9th Cir. 1998) (citing *Harrell v. United States*, 13 F.3d 232, 236
14 (7th Cir. 1993)); *see also 2 Moore's Federal Practice*, § 12.34[2] (Matthew Bender 3d ed.)
15 ("The court may not . . . take into account additional facts asserted in a memorandum opposing
16 the motion to dismiss, because such memoranda do not constitute pleadings under Rule 7(a).").
17 Indeed, "it is axiomatic that the complaint may not be amended by the briefs in opposition to a
18 motion to dismiss." *Car Carriers, Inc. v. Ford Motor Co.*, 745 F.2d 1101, 1107 (7th Cir. 1984).

19 Nonetheless, even if the Court could consider these "new" allegations, they would not
20 warrant reconsideration. The CBA requires more than simply filing a written grievance; it
21 requires unsatisfied grievants to submit to arbitration. (*Id.* at 22–23). Thus, in order to survive
22 Defendant's motion to dismiss, Plaintiff needed to allege that he appropriately submitted the
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1 matter for arbitration. He made no such allegations in his complaint or, for that matter, in any of
2 his other filings. Accordingly, the Court properly dismissed the complaint.

3 **B. Consideration of Defendant's Attachments**

4 Plaintiff also contends that because the Court referred to the CBA, which was not
5 submitted with the complaint, but instead attached to the motion to dismiss, it effectively treated
6 Defendant's motion as a motion for summary judgment, without applying the legal standard for
7 ruling on a motion for summary judgment. (Mot. to Recons., ECF No. 9, at 8). This argument
8 confuses a well settled rule.
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10 "Generally, a district court may not consider any material beyond the pleadings in ruling
11 on a Rule 12(b)(6) motion. However, material which is properly submitted as part of the
12 complaint may be considered on a motion to dismiss." *Hal Roach Studios, Inc. v. Richard Feiner*
13 *& Co.*, 896 F.2d 1542, 1555 n.19 (9th Cir. 1990) (citation omitted). Similarly, "documents
14 whose contents are alleged in a complaint and whose authenticity no party questions, but which
15 are not physically attached to the pleading, may be considered in ruling on a Rule 12(b)(6)
16 motion to dismiss" without converting the motion to dismiss into a motion for summary
17 judgment. *Branch v. Tunnell*, 14 F.3d 449, 454 (9th Cir. 1994). Here, Plaintiff has made claims
18 that are clearly governed by the contents of the CBA. He has not disputed the CBA's coverage,
19 and he has not raised questions concerning the document's authenticity. Therefore, the Court
20 properly considered the contents of the CBA without converting Defendant's motion into a
21 motion for summary judgment.
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25 **C. Whether the Claim Has an Independent Basis In the Fair Labor Standards Act**

26 Finally, Plaintiff argues that the Court disregarded controlling authorities that provide
27 that persons covered by a CBA need not exhaust administrative remedies when filing a claim
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1 under the FLSA. While this argument may have some merit in the abstract, it is unavailing here,
2 because Plaintiff has not made a claim under the FLSA.

3 As Plaintiff deftly notes in his tardy response to the motion to dismiss, “a claim couched
4 as a statutory claim is still subject to exhaustion requirements if the claim is in reality ‘essentially
5 on the contract.’” (Opp’n to Mot. to Dismiss, ECF No. 7, at 9 (quoting *Collins v. Lobdell*, 188
6 F.3d 1124, 1127 (9th Cir. 1999))). In the present case, Plaintiff’s claim sounds in contract, even
7 if it is couched as statutory claim. Essentially, Plaintiff asserts that nonpayment for on-call time
8 constitutes a violation of section 206 of the FLSA, and that this gives rise to liquidated damages
9 under section 216. Poignantly, however, Plaintiff has not alleged that the CBA itself violates the
10 FLSA, or, in other words, that the CBA purports to contain a waiver of statutorily protected
11 rights. Instead, he has simply alleged that he has not been paid for services rendered. Thus, the
12 question before the Court is not one of statutorily protected rights, but one of contract
13 enforcement. Accordingly, the claim is subject to the exhaustion requirements.

14 Furthermore, granting leave to amend the complaint would be futile; on-call time of the
15 type alleged is plainly not compensable under the FLSA. *See McCray v. Ace Parking Mgmt.,*
16 *Inc.*, 453 F. App’x 740, 741 (9th Cir. 2011) (Waiting or on-call time is compensable under the
17 FLSA only if an employee is “engaged to wait,” and a Plaintiff fails to state a claim under the
18 FLSA where the allegations show only that he “waited to be engaged.”); *Brigham v. Eugene*
19 *Water & Elec. Bd.*, 357 F.3d 931, 935–36 (9th Cir.2004) (explaining the predominate factors for
20 determining whether an employee is “engaged to wait” or “waiting to be engaged”); 29 C.F.R.
21 §§ 785.14, 785.17 (explaining how to determine whether “waiting” and “on-call” time
22 constitutes compensable “hours worked” under the FLSA); *see also Armitage v. City of Emporia,*
23 *Kan.*, 982 F.2d 430, 432 (10th Cir. 1992) (Holding that police officers’ on-call time was not
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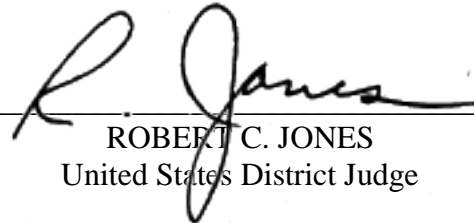
1 compensable where the officers were allowed to do as they pleased while on call, as long as they
2 remained sober; could be reached by beeper; were required to report to duty within twenty
3 minutes of responding to the page; and on average, were called in less than two times per week);
4 *Birdwell v. City of Gadsden*, 970 F.2d 802 (11th Cir. 1992) (reaching the same conclusion on
5 similar facts). Accordingly, the Court properly granted Defendant's motion to dismiss without
6 granting leave to amend. Therefore, the motion to reconsider is denied.
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9 **CONCLUSION**

10 IT IS HEREBY ORDERED that the Motion for Reconsideration (ECF No. 9) is
11 DENIED.
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13 IT IS SO ORDERED.
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15 Dated: October 30, 2013
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20 ROBERT C. JONES
21 United States District Judge
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